

BRB No. 06-0971 BLA

J.W.S.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ADDINGTON INCORPORATED)	
)	DATE ISSUED: 08/27/2007
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinckle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judges, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6827) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed a claim on November 20, 2003. Director's Exhibit 2. The district director denied benefits and claimant requested a formal hearing, which was held on January 24, 2006. Director's Exhibits 13, 22. In his Decision and Order issued on August 24, 2006, the administrative law judge accepted the parties' stipulation that claimant worked for at least ten years in coal mine employment, but he determined that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20

C.F.R. §718.202(a).¹ The administrative law judge also found, in the alternative, that the claim should be dismissed because “a review of the evidence fails to show that a hearing was ever requested in this matter.” Decision and Order at 6. Accordingly, the administrative law judge denied benefits.

Claimant appeals, alleging that the administrative law judge erred in failing to find that he had established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Claimant also contends that the administrative law judge erred in stating, as an alternative basis for the denial of benefits, that claimant had not requested a hearing. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers’ Compensation Programs, has declined to file a brief.²

The Board’s scope of review is defined by statute. The administrative law judge’s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner’s claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge considered four readings of

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant’s most recent coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibits 3.

² The administrative law judge found that there was no biopsy evidence of record to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 6. He also found that none of the presumptions available to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(3) were applicable to this claim. *Id.* We affirm the administrative law judge’s findings pursuant to Sections 718.202(a)(2) and (3) as they are unchallenged by the parties on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

three x-rays dated January 21, 2004, July 28, 2004, and October 27, 2004.³ The administrative law judge properly noted that the January 21, 2004 x-ray was read by Dr. Ranavaya, a B reader, as negative for pneumoconiosis; the July 28, 2004 x-ray was read by Dr. Narra, a B reader, as positive for pneumoconiosis; and the October 27, 2004 x-ray was read as negative by both Dr. Zaldivar, a B reader, and Dr. Wiot, a Board-certified radiologist and B reader. Director's Exhibit 12; Claimant's Exhibit 1; Employer's Exhibits 3, 4.

In weighing the conflicting x-ray readings, the administrative law judge credited the three negative readings for pneumoconiosis over the one positive reading. Decision and Order at 5. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge must consider the quantity of the evidence in light of the qualifications of the readers. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *accord Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Here, considering the numerical superiority of the negative x-ray readings, the administrative law judge took into account the qualifications of the various physicians. Decision and Order at 5. The administrative law judge properly accorded greater weight to the negative x-ray reading provided by Dr. Wiot as he was the only physician who was dually qualified as a B reader and Board-certified radiologist. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Relying on the numerical superiority of the negative x-ray evidence, along with the more credible negative reading by Dr. Wiot, the administrative law judge permissibly concluded that the weight of the x-ray evidence was negative for pneumoconiosis. Although claimant asserts that the administrative law judge ignored the fact that Dr. Narra is also a radiologist, our review of Dr. Narra's curriculum vitae discloses that he is only a Board-eligible radiologist;⁴ and therefore, he

³ The administrative law judge also excluded several negative readings proffered by employer. Employer asserts that the administrative law judge's evidentiary ruling effectively limited its submissions to one affirmative x-ray reading and no rebuttal readings. Employer's Brief at 2. However, in light of our affirmance of the administrative law judge's finding at 20 C.F.R. §718.202(a)(1), we consider any error, committed by the administrative law judge in excluding employer's evidence under 20 C.F.R. .725.414, to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁴ Under the regulations, "*Board eligible* means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology." 20 C.F.R. §718.202(a)(1)(ii)(d). In contrast, "*Board-certified* means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association." 20 C.F.R. §718.202(a)(1)(ii)(c).

is not as qualified as Dr. Wiot. Moreover, in addition to recognizing Dr. Wiot's Board-certification in radiology, the administrative law judge also specifically noted that Dr. Wiot was "the best qualified reader in this record based on his achievements." Decision and Order at 5. Because the administrative law judge had discretion to assign controlling weight to Dr. Wiot's negative reading based on his superior credentials, *see Adkins*, 958 F.2d at 49, 16 BLR at 2-61, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1).

With respect to 20 C.F.R. §718.202(a)(4), claimant contends that the administrative law judge erred by not finding that the records from the Kentucky Office of Worker's Claims "tilts the scales in favor of claimant." Claimant's Brief at 3. We disagree. The Board has held that, while determinations made by other agencies may serve as relevant evidence to a Department of Labor adjudication, such determinations are not binding. *Shegan v. Waste Management and Processors, Inc.*, 18 BLR 1-41 (1994). In this case, the administrative law judge acknowledged that claimant was awarded compensation by the Kentucky Worker's Compensation Board on October 23, 1991 for an occupational lung disease. Claimant's Exhibit 8; Decision and Order at 6. However, he also correctly found that the record from the state agency did not include a diagnosis of coal workers' pneumoconiosis. Decision and Order at 6. Moreover, the administrative law judge properly found that the remaining evidence, including the medical opinions of Drs. Zaldivar and Castle, along with a CT scan dated January 27, 2005, did not support a finding of pneumoconiosis.⁵ Thus, insofar as claimant failed to satisfy his burden of providing a reasoned medical opinion establishing that he suffers from either clinical or legal pneumoconiosis, *see Clark v. Karsts-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*), we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4). Consequently, because claimant failed to establish the existence of pneumoconiosis, a requisite element of entitlement, we affirm the administrative law judge's denial of benefits.⁶

⁵ The administrative law judge properly found that Drs. Zaldivar and Castle opined that claimant did not have pneumoconiosis, and that the CT-scan dated January 27, 2005 was interpreted by Dr. Michael as showing chronic obstructive pulmonary disease (COPD), but Dr. Michael did not mention pneumoconiosis. Decision and Order at 4, 6; Claimant's Exhibit 6; Employer's Exhibits 3, 7. Dr. Michael did not discuss the etiology of the COPD. Claimant's Exhibit 6.

⁶ The administrative law judge mistakenly stated, as an alternative basis for the denial of benefits, that "a review of the evidence fails to show that a hearing was ever requested in this matter." Decision and Order at 6. Contrary to the administrative law judge's finding, the record discloses that claimant timely requested a hearing on

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

September 4, 2004, within thirty days of the district director's Proposed Decision and Order, dated August 9, 2004. Director's Exhibits 13, 22. We consider the administrative law judge's error to be harmless since claimant actually received a hearing, and he has not been prejudiced by the administrative law judge's alternative finding. *See Larioni*, 6 BLR at 1-1278.